

# Parliamentary Control over Delegated Legislation in Japan

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## Abstract

*The delegation of legislation from the parliament to the administration plays an important role in a modern administrative state. In Britain, parliamentary control – whereby the parliament has the right to approve or veto a delegated legislation – has been institutionalized and implemented. On the other hand, the Japanese parliament is powerless to approve a delegated order beforehand or ex post. Therefore, improper procedures such as the deviation of the delegated order from the enabling act by a governmental agency, or the introduction of arbitrary administrative measures, have been carried out under insufficient supervision by the parliament in Japan. The National Diet of Japan should, ideally, also hold the power to control the administrative order on the basis of the legal principles formulated by the Diet. Therefore, we propose the introduction of a parliamentary control system that invalidates the ex post enactment of a cabinet order if both Houses of parliament refuse the order within 40 days of its submission. These procedures would have increased efficacy when augmented with a political check function on the proposed cabinet orders by the parliament's Committee on Oversight of Administration, or their standing committees.*

**Keywords:** statutory instruments, sole law-making organ, supplementary resolution, legislative veto, Committee on Oversight of Administration.

## A Introduction

The delegation of legislation from the parliament to the administration is indispensable for the modern administrative state. The delegation of a piece of legislation means that the legislature per se does not make a decision but authorizes a governmental agency to do so. There are four factors related to an increase in the use of delegated legislation by the Japanese Diet: (1) the complexity of administration in modern society; (2) the time restriction involved in Diet deliberations; (3) the limited special and technical abilities possessed by the parliament; and (4) the rapid measures necessary for achieving significant social change.<sup>1</sup>

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1 A. Ueda, 'Kokkai to Gyōsei (Diet and Government)', in A. Ueda (Ed.), *Kokkai to Gyōsei (Diet and Government)*, Tokyo, Shinzansha, 1988, pp. 20-21.

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The majority of laws continue to be based on cabinet-submitted bills, which, in a parliamentary cabinet system, are ordinarily drafted by civil servants working in the executive branch of government. As the administrative functions of governments have grown, there has been a growing trend for parliament to simply legislate a law's main aspects; the elaboration of details is left to the cabinet. By carrying out administrative legislation duties, such as cabinet orders (*seirei*), ministerial ordinances (*shōrei*), notifications (*tsūtatsu*) and so on, the bureaucrats of the executive branch shape and control basic policy; further, on occasion, they can even render it wholly ineffectual. This increase in the influence of a democratically unaccountable bureaucracy over the legislative process occurs outside the purview of the Japanese Diet and signals a decline in transparency in the process related to the initiation and execution of law.

Under Article 41 of Japan's constitution, the Diet is the sole law-making organ of the state. The Diet must remedy any administrative legislation that has bypassed the policy-making process, that is, the Diet must oversee and determine whether the delegated legislation proposed by the administration is within the legally authorized limits. Further, it should endeavour to detect any deviation from the relevant parent act. However, parliamentary control over delegated legislation has not yet been institutionalized in Japan. Therefore, the function of checking the deviation of a delegated order from the parent act has been left to the courts. However, it must be noted that, in most cases, judicial review of the delegated legislation is not carried out.

On the other hand, in a state such as Britain, which follows the convention of an extensive legislative-power delegation by the government, a delegated legislation can also be used to revise or abolish a parliamentary statutory law.<sup>2</sup> Therefore, in Britain, parliamentary control, whereby the parliament has the right to grant approval to, or exercise veto power over, a delegated legislation, has been institutionalized and implemented. By the use of such a right of control, the parliament can deter deviation from the enabling act by the governmental agency either beforehand or ex post facto.

The mechanism of parliamentary control over the delegated orders in Britain suggests the necessity for the Japanese Diet to control a delegated legislation; this is because the judicial system does not have the responsibility to check the delegated order's deviation from an enabling act. Moreover, while the screening by a court of justice is only a screening for legitimacy, the Diet can also perform the screening for political adequacy based on its position as a political wing.<sup>3</sup> It is increasingly difficult for a parliament to enact an enabling act that clearly shows the policy, in advance, under today's complicated social circumstances. A delegated-order proposal is made beforehand by the governmental agency, and there is a greater need for the parliament to judge whether the delegated legislation is right or wrong.

Accordingly, in this article, after surveying the present situation of the delegated legislation in Britain and Japan, the control over the implementation of the

2 R. Rogers & R. Walters, *How Parliament Works*, 7th ed., London, Routledge, 2015, p. 224.

3 M. Ōishi, *Gikai-hō (Law of Parliament)*, Tokyo, Yūhikaku, 2001, p. 92.

delegated legislation by each parliament is compared. Moreover, the author proposes a system and operational procedures that should be adopted for the Japanese Diet's controls over delegated orders; these lag behind those of other countries, particularly in terms of their institutionalization.

## B Parliamentary Control over Delegated Legislation in Britain

In Britain, the parliamentary control of a delegated legislation was institutionalized by the Statutory Instruments Act 1946, which is still in force. This statutory instrument is a secondary legislation that the government enacts on the basis of the legislative-power delegation by the parliamentary statutory law, which is the first legislation. Further, in Britain, the dependence on delegated legislation is largely an administrative-state phenomenon. The number of statutory instruments is about 80 times the parliamentary statutory laws enacted from the 1990s to the present (Table 1).

There are two kinds of procedures for the examination of this statutory instrument by the parliament. The first is an affirmative resolution procedure, in which the statutory instrument concerned is passed or becomes effective if it is approved by both Houses. The second is a negative resolution procedure, in which the statutory instrument concerned is passed or becomes effective as long as there is no decision on its disapproval by either House of the Parliament within 40 days of its submission. The number of affirmative resolution procedures submitted to the House of Commons is about 200, and they constitute 18 per cent of the total procedures annually; the negative resolution procedures constitute the remaining 82 per cent of the total (Table 2). An affirmative resolution procedure requires the government to take the approval of both Houses; the negative resolution procedures constitute a vast majority of the total procedures because they reduce the screening load on the parliament.<sup>4</sup>

Both the affirmative resolution and negative resolution procedures have two stages—the preliminary consideration before enactment of the statutory instrument and the *ex post facto* screening after enactment. In an affirmative resolution procedure, preliminary consideration is a default requirement, and an *ex post facto* screening is used only in case of emergency (Table 2). By precedent, an affirmative resolution procedure is restricted to important statutory instruments, such as those seeking to change a parliamentary statutory law, define a tax increase or new taxation proposal or define a serious accusation. About the statutory instrument (proposal) that the House of Commons approved, the self-suppression committed the House of Lords non-electing by popular vote, and most of them have been approved.<sup>5</sup> On the other hand, the negative resolution procedure is usually used in an *ex post facto* screening, and preliminary consideration is seldom used (Table 2). In the case of the statutory instrument about the taxa-

4 Y. Tanaka, *Ininrippō to Gikai (Delegated Legislation and the National Diet)*, Tokyo, Nihonhyōronsha, 2012, p. 212.

5 T. Kawashima, 'Igirisu Gikai ni okeru Gyōsei Kanshi (Administrative Oversight in the British Parliament)', *Gaikoku no Rippō*, Vol. 255, 2013, pp. 60-61.

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**Table 1** *Number of laws enacted by parliament and number of statutory instruments (1990-2016)*

	Number of acts UK Parliament	Number of acts Scottish Parliament	Number of UK SI	Number of Scottish SI	Number of acts/SI Welsh Parliament
1990	46		2667		
1991	69		2953		
1992	61		3359		
1993	52		3276		
1994	41		3334		
1995	54		3345		
1996	63		3291		
1997	69		3114		
1998	49		3323		
1999	35	1	3501	203	
2000	45	12	3433	453	
2001	25	15	4150	494	
2002	44	17	3279	570	
2003	45	19	3367	623	
2004	38	12	3459	565	
2005	24	16	3602	663	
2006	55	17	3515	616	
2007	31	19	3688	584	
2008	33	7	3371	441	2
2009	27	12	3468	455	5
2010	41	18	3117	471	8
2011	25	16	3136	458	7
2012	23	11	3329	360	2
2013	33	14	3314	366	7
2014	30	19	3563	385	7
2015	37	13	2059	447	6
2016	25	22	1242	438	6

Source: V. Apostolova, *House of Commons Library Briefing Paper, Acts and Statutory Instruments: the Volume of UK Legislation 1950 to 2016*, House of Commons, 2017, p. 7.

tion system, only the House of Commons has the right to screen.<sup>6</sup> Moreover, at the time of examining a statutory instrument, the parliament cannot rectify the statutory instrument concerned. The approval or disapproval resolution put in block alone is accepted; however, attaching an incidental condition to the resolution is allowed. Thus, by approving the motion about a statutory instrument, the parliament can make a minister resubmit it and also correct factual matters.

The screening by the parliament of a statutory instrument is performed by a committee, rather than through a plenary session; this is because of the special skills, rapidness and mobility that the instrument requires. The committees that have

6 Sir J. Malcolm (Ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th ed., London, LexisNexis, 2011, p. 672.

**Table 2** *Number of statutory instruments submitted to House of Commons (1997-2017)*

	Affirmative procedure				Negative procedure				Number prayed	Others	Total Number
	Draft	Made	Northern Ireland	Subtotal	Draft	Made	Northern Ireland	Subtotal			
1997-1998	141	49	35	225	23	1506	62	1591	300	40	1856
1998-1999	132	39	7	178	9	1230	27	1266	51	35	1479
1999-2000	136	41	3	180	13	1200	28	1241	28	35	1456
2000-2001	102	21	0	123	3	700	14	717	24	28	868
2001-2002	208	51	3	262	10	1426	32	1468	54	58	1788
2002-2003	167	38	28	233	2	1158	56	1216	42	25	1474
2003-2004	159	16	32	207	4	976	58	1038	18	36	1281
2004-2005	100	3	23	126	1	621	38	660	13	7	793
2005-2006	228	6	37	271	1	1494	88	1583	38	31	1885
2006-2007	193	12	19	224	23	1506	45	1574	19	2	1800
2007-2008	229	13	15	257	0	1010	39	1049	28	13	1319
2008-2009	233	23	5	261	5	962	43	1010	30	29	1300
2009-2010	164	13	2	179	3	603	25	631	8	11	821
2010-2012	345	36	5	386	29	1340	2	1371	27	52	1809
2012-2013	210	4	0	214	11	730	1	742	12	38	994
2013-2014	244	16	7	267	24	856	2	882	2	24	1173
2014-2015	356	22	3	381	35	942	2	979	9	18	1378
2015-2016	133	16	2	151	22	541	22	585	19	21	757
2016-2017	160	5	1	166	27	494	16	537	21	22	725

Source: House of Commons Sessional Returns 1997/1998 to 2016/2017.

played a central role in the screening of the statutory instrument are the Joint Committee on Statutory Instruments, which screens to ascertain whether a delegated order meets the technical requirements for the delegation of an enabling act, and the Secondary Legislation Scrutiny Committee of the House of Lords, which performs the substantive political examination of a delegated order. In particular, the Secondary Legislation Scrutiny Committee of the House of Lords annually undertakes the substantive examination of over 1,000 statutory instruments and brings it to the attention of the House of Lords, if needed.<sup>7</sup> There is an instance of the government being defeated by the voting on a statutory instrument, with six cases in the House of Lords in 1968; since then, there has been only one – in 1969 – in the House of Commons.<sup>8</sup> This is considered to be one of the reasons why the ruling party does not have a plurality in a House of Lords, unlike in the House of Commons, where the ruling party has a majority.

## C The Problem with Delegated Legislation in Japan

### I The Present Context

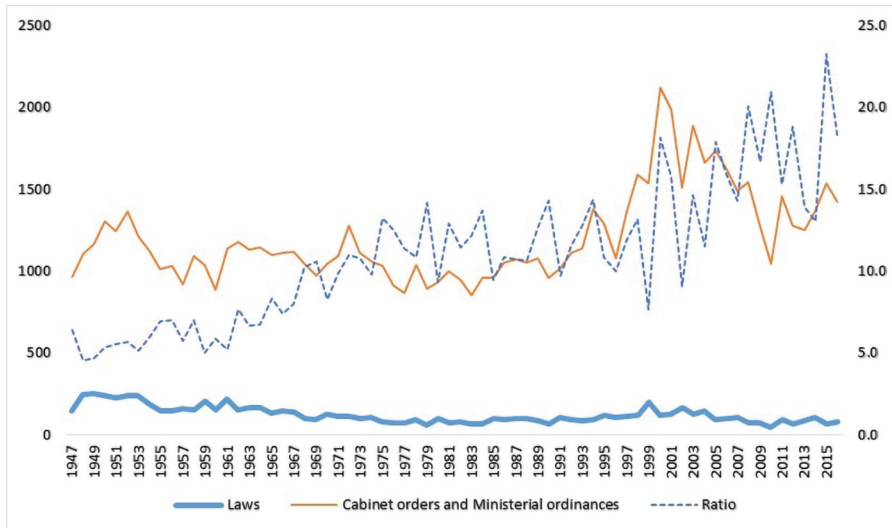
Delegated legislation in Japan is constitutionally valid as per the Constitution regulation authorizing the penalty for a cabinet ordinance (Japan's Const., Art. 73-6, Conditional clause). Delegated legislation is permitted owing to the demand for special skills, rapid measures or the political neutrality of a policy in a modern administrative state. However, because the Constitution makes the Diet the

7 Kawashima, 2013, pp. 61-62.

8 Rogers & Walters, 2015, pp. 228-229.

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**Figure 1** Comparison of the number of cabinet-submitted laws that were enacted and the cabinet orders and ministerial ordinances promulgated in Japan (1947-2016)



Source: The National Printing Bureau of Japan, Kanpō (Official gazette).

State's only legislative organ, concrete authorization of individual pieces of legislation is required, rather than comprehensive and carte blanche authorization of administrative legislation. Delegated legislation does not revise or abolish a law. Ministries and government offices define the details that actualize a law within the framework of the relevant policies and standards, as specified by law. The right to adjudicate whether the delegated legislation exceeds the authorized limit rests with the Diet; further, it can determine the validity of a piece of delegated legislation by using its original rights of interpretation. Furthermore, the Diet can always carry out surveillance and vouch that the contents of a piece of delegated legislation are suitable.<sup>9</sup>

The number of such cabinet orders and ministerial ordinances is also considered an indicator of administrative discretion. A large number of such orders and ordinances shows that there is a great deal of bureaucratic discretion; conversely, a smaller number shows that there is little bureaucratic discretion. This study compares the number of cabinet orders and ministerial ordinances with the number of cabinet bills passed by the Diet during every calendar year in post-war Japan. Figure 1 shows the ratio of the number of cabinet orders and ministerial ordinances to the number of cabinet bills that became acts. This figure shows that while the number of cabinet orders and ministerial ordinances has increased in the long run, with a peak during the reorganization of the central ministries in

9 T. Nonaka et al., *Kanpō (Constitution) II*, 5th ed., Tokyo, Yūhikaku, 2012, p. 77.

2001, the number of cabinet bills becoming acts is decreasing. As a result, it may be concluded that the ratio of the number of cabinet orders and ministerial ordinances to the number of cabinet bills becoming acts is increasing in the long run. The rise in the ratio of cabinet orders and ministerial ordinances has been occurring since the 1970s. Pempel explains this by noting that the government is dependent on the administrative means of cabinet orders and ministerial ordinances, rather than legislation, for implementing policy.<sup>10</sup> A delegated legislation in the form of an administrative order is often used as a means to avoid the parliament in a country, such as Italy, where the hurdles to the enactment of a law are high owing to the existence of a player exercising veto power.<sup>11</sup> In Japan, the government utilizes cabinet orders and ministerial ordinances, rather than laws, because this approach allows it to bypass the resistance and counterinfluence from: (i) some factions of the governing party and (ii) the media and the public. In addition, the use of cabinet orders and ministerial ordinances allows the government to avoid the parliament, where the enactment of bills is made difficult by the resistance from opposition parties, or because of the parliamentary influence over the governing and opposition parties.

Masuyama rejects the parliament bypass theory. On the grounds that there is no complementary relationship between ministerial ordinances and cabinet bills on similar subjects, he insists that the use of legislative authority by a bureaucrat's ministerial ordinance is to be encouraged, and there is synergy between law and ministerial ordinances, as long as a bureaucrat is faithful to the parliament's intentions.<sup>12</sup> In particular, loyal bureaucrats, who act in line with the goals of the ruling party, can be systemically rewarded for their discretion in promulgating administrative ordinances. This suggests that the ruling party's agenda automatically prioritizes bureaucratic legislation. According to the rational delegation theory, as long as the leaders of the ruling party can control the bureaucracy through effective monitoring, a delegated order would not deviate from the parent law.<sup>13</sup> Therefore, the parliament's prior and subsequent control over delegated legislation is not required.

The bureaucracy drafts cabinet bills; however, entrusting the bureaucracy with the responsibility of determining the concrete contents of cabinet orders and ministerial ordinances may weaken the parliament's control. Moreover, if the process of delegated legislation is frequently used, members of parliament may struggle to grasp the bill's contents, and real discussion on them may become more difficult.<sup>14</sup> By contrast, when a parliament insists on the specification of the

- 10 T.J. Pempel, 'The Bureaucratization of Policymaking in Postwar Japan', *American Journal of Political Science*, Vol. 18, No. 4, 1974, pp. 654-656.
- 11 A. Kreppel, 'The Impact of Parties in Government on Legislative Output in Italy', *European Journal of Political Research*, Vol. 31, 1997, pp. 340-341.
- 12 M. Masuyama, *Gikai Seido to Nihon Seiji – Giji Un'ei no Keiryōseijigaku (Agenda Power in the Japanese Diet)*, Tokyo, bokutakusha, 2003, pp. 162-165.
- 13 J.M. Ramseyer & F.M. Rosenbluth, *Japan's Political Marketplace: With a New Preface*, Cambridge, MA, Harvard University Press, 1997, pp. 107-108.
- 14 M. Nakamura (Ed.) *Hajimete no Kenpō-gaku (The First Study of the Constitution)*, 3rd ed., Tokyo, Sanseidō, 2015, p. 167.



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details of a law to minimize a governmental agency's discretion, it paralyzes administrative execution and may also damage the mobility of a legal operation. It is, thus, desirable for a governmental agency to strictly reflect the parliament's intentions in the contents of a bill while drafting it; further, the enactment of the delegated legislation should be carried out by considering the parliament's intentions. However, since the degree of legislative discipline in Japan is still low, an item-by-item discussion is not carried out in the parliament's deliberation on bills. Therefore, in many cases, legislators' intentions behind individual regulations are uncertain. This is thought to produce arbitrary judgments by the bureaucracy in its decisions about delegated legislation, which consequently leads to deviations from the parent act. There is also evidence that indicates that in some cases the contents of delegated legislation enacted by the bureaucracy accord with neither the legal goal nor legislators' intention.<sup>15</sup>

## II Cases Where Delegated Legislation Deviates from the Parent Act

Judicial review of a delegated legislation has been carried out by screening for constitutionality or legality. The Pharmaceutical Affairs Law ministerial ordinance, enacted by the Ministry of Health, Labor and Welfare in 2009, regulated the online sale of high-risk and intermediate-risk category drugs through mail or an online channel, in response to the enforcement of the amended Pharmaceutical Affairs Law, enacted by the government in 2006. However, no provision of the law explicitly bans online sales. The Supreme Court ruled that these regulations significantly restrict the freedom of professional activity, which is guaranteed under the Constitution, and concluded that nothing in the Pharmaceutical Affairs Law itself, or in the legislative processes that created it, could be seen as granting the Ministry the authority to institute such a ban.<sup>16</sup> Within the then government, the Council for Regulatory Reform insisted that it was not proven that the online sale of drugs was less safe than over-the-counter sale in pharmacies and that the regulation obstructed consumers' convenience. The strengthening of this regulation also attracted negative opinions from those within the then ruling alliance of the Liberal Democratic Party and Komeito Party. The Ministry of Health, Labor and Welfare, thus, avoided revising the law; further, it may try for a regulation introduced by a ministerial ordinance, which can be prepared by the Ministry of Health itself. In this case, the promulgation of the order that deviated from the limit for delegation of an enabling act was recognized as invalid by the court of justice.

By contrast, a public comment carried out in April 2014 on a ministerial ordinance of the livelihood protection law imposed a duty to submit a welfare application at the time of application and was related to the contents of the law, thereby strengthening the investigation required for support. This ministerial-ordinance scheme was an aspect of the bill imposed in contravention of the member revi-

15 H. Maeda, 'Giin'Naikaku-sei Ni Okeru Kokkai no Gyōsei Tōsei (Diet's Control over the Administration in the Parliamentary Cabinet System)', *Nenpō Gyōsei Kenkyū*, Vol. 27, 1992, pp. 69-71.

16 *Iyakuhin netto hanbai case (Pharmaceutical online sales case)*, Case 2012 (Gyo-Hi) 279, Minshu Vol. 67, No. 1 (Sup. Ct. P.B. 11 January 2013), p. 1.



sion, which read that “what is necessary is to accept word-of-mouth as before, and to simply submit an application form confirming the decision of protection”. The strengthening of the support survey was also an aspect of the bill that ran contrary to the government authorities’ views on framing the bill; this suggested that strengthening the requirements for support should be carried out “only within very restricted cases.” Many statements opposing the revision were issued by the Japan Federation of Bar Associations, the Japanese Association for Psychiatric Social Workers, the Japanese Association of Social Workers in Health Services, among others, and included a national response meeting on livelihood protection problem. In the public comment, 1,166 comments were submitted to the Ministry of Health, Labor and Welfare. As a result, the Ministry of Health, Labor and Welfare stated that “we correct the contents in line with the government authorities’ explanation to the Diet so that unnecessary anxiety and confusion may not be produced”. The Ministry of Health, Labor and Welfare removed the regulation on the application submission time from the ministerial-ordinance proposal, and the corrections to the contents of the bill were limited to exceptional circumstances in surveys of a duty of support. Thus, while many strong dissenting opinions from the public, including those from professional groups, were submitted, the Ministry of Health, Labor and Welfare, which aimed to draw up the ministerial-ordinance proposal with contents contrary to the consensus achieved by the governing and opposition parties, the Diet, or the explanation from government authorities, was obliged to revise the ministerial ordinance proposal through the procedure of public comment.

In this case, the public comment contributed to the prevention of an intentional bypassing of the legislators’ intention in the Diet by ministries and government offices. In the public comment procedure, introduced in 2006, when organs establish administrative orders or other orders (orders established pursuant to acts, review standards, disposition standards and administrative guidance guidelines), they shall notify the public in advance of the proposed administrative or other orders and shall seek comment from it within a thirty-day period. Organs establishing administrative or other orders shall adequately consider all comments submitted to them and shall publicly notify the results following the consideration of the submitted comments and the grounds for the decision, at the same time as the promulgation of the administrative or other orders.

To date, the public comment process has been carried out in 10,917 cases, on the basis of an Administrative Procedures Act; in 7,679 cases, it was done through optional public comment. Since the contents of administrative orders contain many sections relevant to the establishment, revision and abolition of a regulation, it can be argued that the operation of the public comment system favours the ministries and government offices that have jurisdiction over a large number of regulatory policies (Table 3). In government agencies’ policy formation process, various interest groups have a voice in the council. Nonetheless, the public comment process can offer an opportunity for the government agency to reflect on the public’s opinions on the issue at hand. Therefore, the obligation to seek public comment is not imposed in cases where the bill is enacted by a parliament to which the public can send representatives through an election. The issue that

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remains, however, is that public comment processes are used as an excuse by government agencies for adequately engaging with public opinion. Therefore, the influence that the opinions submitted have on the final decision of the administrative order by government offices determines the evaluation of the public comment system. To date, the percentage of submitted opinions taken into consideration that have resulted in changes, such as correcting an order scheme, are as follows: 25.3 per cent (2005), 28.8 per cent (2007), 25.2 per cent (2008), 32.5 per cent (2009), 22.8 per cent (2013) and 20.8 per cent (2015); this works out to an average of approximately 25 per cent.<sup>17</sup>

About the Pharmaceutical Affairs Law ministerial ordinance, enacted by the Ministry of Health, Labor and Welfare in 2009, the Ministry also carried out a public comment process based on the Administrative Procedures Law. The opposing opinions to a ministerial-ordinance proposal constituted 2,303 of the 2,353 comments received. Nevertheless, the Ministry of Health, Labor and Welfare, which hardly considered the opposing opinion, enforced the ministerial ordinance as the draft proposal. Thus, in order to prevent a deviation from the legislators' intention in the Diet caused by ministries and government offices during the drafting phase of a delegated legislation, the use of public comment as a prior measure and the judicial review as an *ex post* measure is seen to play an important role. However, their use is rare, and most cabinet orders and ministerial ordinances are created at the discretion of ministries and government offices. Because of this, the Diet should control the deviation from the legislative intention through the *ex post* surveillance of a legislation and check a ministerial-ordinance proposal without being dependent on public comments and a judicial review.

### *III Restriction on the Discretionary Power through a Supplementary Resolution*

Regarding a system for the Diet to curb the discretionary power of the ministries and government offices in delegated orders, there exists a supplementary resolution that explicitly shows the intention of a committee at the time of deciding a bill. This supplementary resolution decides the requests of the committee, the attention paid to the operation of a governmental agency at the time of voting on a bill, and so on. Although this supplementary resolution does not have the same binding force as a law, it has political and a moral binding power to a minister in jurisdiction.<sup>18</sup> In the 15 years since 2004, the proportion of cases in which the supplementary resolution was attached to the committee of the effectuated bill has been about 50%. That is, the committees of both Houses show that the supplementary resolution is constantly used in the vote on the main bills that are passed and become acts. However, even if such a supplementary resolution is car-

17 Sōmu-shō, 'Gyōsei Tetsuzuki-hō no Shikō Jōkyō ni Kansuru Chōsa (Survey on the Enforcement Situation of Administrative Procedure Law)', 2017, Sōmu-shō home page. Available at: [www.soumu.go.jp/main\\_sosiki/gyoukan/kanri/tetsuzuki/tetsuzuki\\_tyousa.html](http://www.soumu.go.jp/main_sosiki/gyoukan/kanri/tetsuzuki/tetsuzuki_tyousa.html) (last accessed 31 October 2019).

18 I. Asano & H. Kōno, *Shin Kokkai Jiten (New Diet Dictionary)*, 3rd ed., Tokyo, Yūhikaku, 2014, p. 148.

**Table 3** *Number of public comments classified by the government ministries and agencies*

	FY2006	FY2007	FY2008	FY2009	FY2013	FY2015	Total
Ministry of Health, Labour and Welfare	169	215	236	163	183	280	1246
Ministry of Land, Infrastructure, Transport and Tourism	145	102	152	102	135	135	771
Ministry of Economy, Trade and Industry	118	134	133	126	62	133	706
Ministry of Agriculture, Forestry and Fisheries	97	89	135	116	81	106	624
Ministry of Internal Affairs and Communications	61	93	79	72	57	88	450
Ministry of the Environment	40	46	30	39	49	48	252
Financial Services Agency	29	40	33	39	50	39	230
Ministry of Education, Culture, Sports, Science and Technology	21	25	31	35	25	37	174
Ministry of Justice	18	29	30	17	16	40	150
Cabinet Office	20	20	22	7	20	30	119
Ministry of Finance	11	20	22	15	6	25	99
National Public Safety Commission	8	10	19	11	6	9	63
Consumer Affairs Agency	0	0	0	13	10	13	36
Ministry of Defense	5	5	2	5	4	9	30
Ministry of Foreign Affairs	0	3	1	0	8	6	18
National Personnel Authority	3	2	2	1	2	6	16
Other ministries	4	1	3	4	8	26	46
Total	749	834	930	765	722	1030	5030

Source: Sōmu-shō, 'Gyōsei Tetsudzuki-hō no Shikō Jōkyō ni Kansuru Chōsa (Survey on the Enforcement Situation of Administrative Procedure Law)', 2017, Sōmu-shō home page.

ried out, it is not rare for ministries and government offices to disregard the legislative intention of the Diet in enacting delegated legislation.

Because the Casino law, enacted in July 2018, decriminalizes a gambling act and authorizes private sector gaming-house establishment for the first time in history, its enactment was strongly opposed by a support group for those with a gambling dependency, and the Japan Federation of Bar Associations. The law proposal, in the matter entrusted to the cabinet order, the ministerial ordinance, and the committee rule about the concrete contents of system operations, such as the size of a casino venue and a treasury loan by a casino undertaker, has 331 items. Therefore, the fact that the contents of a casino regulation or the countermeasures against gambling dependence were unclear was regarded as questionable.

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Further, it was decided through deliberation in a committee also with both Houses for a short time, and the details about the design of institutional arrangements are to be entrusted to the Ministry of Land, Infrastructure, Transport and Tourism without sufficient examination in a Diet. On the occasion of the approval of a bill, the House of Councillors' Standing Committee on Cabinet attached a supplementary resolution containing no fewer than 31 items. Many of the supplementary resolutions became an order from the Diet to the ministries and government offices that define a cabinet order, a ministerial ordinance and a committee rule. However, while enactment of the main cabinet orders and a ministerial ordinance is advanced by the Ministry of Land, Infrastructure, Transport and Tourism, it is apprehensive about taking a decision on the delegated order without sufficient consensus among citizens.

On the other hand, the work-style reform law enacted in June 2018 also had a delegated legislation of no fewer than 90 items in the form of a cabinet order and ministerial ordinance. The greatest sticking point in the high-level professional system, which places the partial professional job of the fat income out of a worked-hours regulation, and became a focus of Diet deliberations, related to the requirements for a yearly income and target job categories. The requirements for highly specialized professionals was prescribed as "need an advanced expertise and the relevancy of a worked hours and an outcome is not high" in the bill, and was also prescribed as "the level which turns out to be three times the annual average income on a considerable degree" about the yearly income; further, all the details were mentioned in the ministerial ordinance. Therefore, the Health, Labor and Welfare Committee of the House of Councillors came up with a supplementary resolution for the government so that the limited listing of the object occupation might be carried out concretely and clearly in the ministerial ordinance. As a result, the Ministry of Health, Labor and Welfare enacted the ministerial ordinance that requires a yearly income of JPY 10,750,000 or more and makes an object occupation five kinds, such as development business of a financial product. However, in the future, the reduction in the level of yearly income and an extension of an object occupation are possible through a revised ministerial ordinance, and concern is shown from a fatigue death survival family or labour union. Given the aforementioned problem, the Diet should ensure active participation to the contents of a policy of a delegated order.

#### *IV The Report to the Parliament of a Delegated Legislation and a Committee Deliberation*

In the revised Immigration Control and Refugee Recognition Act for the acceptance of new foreign workers, which came into effect in December, 2018, a complete picture of the legal system, which includes a delegated order before a law enforcement, was presented to the parliament by the government; further, deliberations were held in a committee. The Immigration Control and Refugee Recognition Law reform bill was proposed to establish the 'specified skilled worker' as new status of residence which accepts working to the un-special field which has a constant skill. However, the Immigration Control and Refugee Recognition Law

reform bill had entrusted the concrete contents of specified skill worker's requirements, such as the type of business of a specific skill, the standard of the salary and a resident's time limit, to the governmental operational policy, the cabinet order and the ministerial ordinance. The members of the Opposition criticized this by stating, "It is a problem if the Ministry of Justice uses substantial legislative power" by relegating the details of this law to the cabinet order and the ministerial ordinance. However, the government sought to provide concrete details of the matter in subordinate statutes, such as a ministerial ordinance, because of their greater flexibility. On the other hand, the government received a request from the opposition party and presented the acceptance type of business of 14, as well as a tentative calculation of the number of acceptance estimates of an industrial classification at the time of entering into a committee deliberation. The opposition party regarded the evidence of the tentative calculation as being questionable and asked for an explanation about the upper limit of the number of acceptances. However, the government answered that the upper limit of the number of acceptances was defined by the operational policy after a law's enactment and that the Diet committee did not perform an adequate examination of the institutional core. Although the ruling party hurried the vote in the House of Representatives towards the end of the session, the opposition party abstained from the vote in the House of Representatives on the Immigration Control and Refugee Recognition Law reform bill because of the paucity of deliberations. As a result, the Speaker of the Lower House, Ōshima, asked the government to present to the parliament the complete picture that includes a cabinet order and a ministerial ordinance before the enforcement of a law and requested a response to a re-question. In response to a law's enactment, the government reported the complete picture of legal systems, such as an operational policy about the acceptance of the specified skilled worker, a cabinet order and a ministerial-ordinance proposal, and comprehensive measures, to the Diet on March 2019. In response to the questions, explanations were given by the House of Representatives Committee on Judicial Affairs. However, there is no change in the important matter concerning a specified skilled worker having been attained, without undertaking a future deliberation on bills in the Diet; this is because the delegated order has been entrusted to provide the skeleton of such a design for institutional arrangements.

#### *V How Should the Diet Control Delegated Legislation?*

As noted previously, control over a piece of delegated legislation's deviation from the parent act is overseen through the enforcement of public comment by the Administrative Procedures Law, passing judgment over the legitimacy of the delegated order by a court of justice and so on. However, the power of a court of justice is restricted to the specific matter about which a suit has been submitted, and the judgment is about the legitimacy of a specific piece of delegated legislation. As the acceptable level of discretion when enacting a delegated order is extensive, it is difficult for a court of justice to sufficiently adjudicate the function that checks deviation from the enabling act of a delegated order. Yet parliamentary control, by virtue of its position as a political act, can screen for political adequacy, among

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others.<sup>19</sup> There is currently no power to approve a delegated order beforehand or ex post in the parliament. Therefore, the deviation of the delegated order from the enabling act by a governmental agency and the operation of an arbitrary administrative measure have been carried out with insufficient surveillance by the Diet. A request should be made to the legal principles made by the Diet that the Diet should hold the power to control governmental agencies' decision-making and effects on the administrative order. Therefore, in Japan, the Diet's power of control over a delegated order should be specified in an individual enabling act, similar to the procedures carried out in Britain or Germany. Parliamentary control legislation should probably also be enacted as a general law that imposes on the Diet the duty of approving highly important delegated orders. How can we introduce effective procedures for the Diet's control of delegated legislation in Japan?

Tanaka proposes a screening of negative or positive procedures at the plenary session of both Houses, based on substantive examination carried out by a standing committee.<sup>20</sup> Further, parliamentary control must be exempt from the specialized administrative tasks and allow mobility for tasks to be carried out by the administration in a complex modern nation. He thinks that it is, at present, desirable to institutionalize the ex post parliamentary control to a delegated legislation as a legislative veto.<sup>21</sup>

The feasibility of this type of ex post parliamentary control remains in question. In relation to the Diet's control over delegated orders, the cabinet's urgent cabinet-order constitutive power and the Diet's ex post facto approval provision for disaster emergencies exist on the basis of Article 109 of the Basic Act on Disaster Control Measures. However, this provision was not invoked in the 2011 Great East Japan earthquake, which was an unprecedented catastrophe. Moreover, despite there being a parliamentary ex post facto approval provision for urgent cabinet orders in the Act concerning Measures for the Protection of the People in Armed Attack Situations, there have been no cases where the provision has been invoked.

In contrast, in the revision of the Customs Tariff Law in 1961, the Socialist Party once asked for the Diet's ex post facto approval by noting that the cabinet-order authorization of the emergency tariff was in contravention of the principle of no taxation without legislation. Consequently, when the cabinet decided on the emergency tariff measure, a provision was added that imposed on it the responsibility to report the contents of the measure to the Diet without delay. Overall, there have been 118 cases where the opposition party required the Diet's ex post participation in the deliberation process of the bill and submission of a report to the Diet.<sup>22</sup> For example, the National Government Organization Act requires an

19 Ōishi, 2001, p. 92.

20 Tanaka, 2012, pp. 261-262.

21 Y. Tanaka, 'Gikai Sei no Resurrection – Gikai Ni Yoru Ininrippō no Kantoku Tōsei (Resurrection of Parliamentary Government: Parliamentary Supervision and Control over Delegated Legislations)', *Kenpōmondai*, Vol. 26, 2015, p. 31.

22 Sangiinjimukyoku (Ed.), *Heisei 28-nenban Sangiin Yōran (2016 edition House-of-Councillors Handbook) I*, Tokyo, Sangiinjimukyoku, 2016, pp. 769-775.



ex post facto report to the Diet when the government has newly established or revised main institutional frameworks. Moreover, while giving the cabinet the power to act on the important question of a country's state of emergency, there are ten laws that need the Diet's approval, before or after the event, for the cabinet to use its power to act. For example, in cases regarding the Self-Defense Forces, the Diet's prior permission is required for: defence operations and logistics support activities in situations that will have an important influence on Japan's peace and security; cooperation and support operations in situations threatening international peace and security; and so on. The provision of ex post facto approval in cases of emergency and the provision of responsibility for decision days applies to these operations (Table 4). Thus, there are 22 pieces of legislation that require the Diet's approval and 21 pieces of legislation that require it to pass a resolution.<sup>23</sup>

With respect to matters requiring a Diet resolution, when a House that subsequently considers this resolution disagrees with the House that considered the resolution first, it may call for a meeting of the Conference Committee (The Diet Law, Art. 87). When the decision of the governing and opposition parties has been reversed by the House of Councillors, there can be cases, such as a divided Diet, where bicameral decisions on some matters may differ on issues requiring a Diet resolution.<sup>24</sup> When a delegated order requires the Diet's approval or a Diet decision, it is effectively rejected if there is no agreement among the governing and opposition parties within the Conference Committee.

In Japan, what is the control procedure for parliamentary approval of cases of feasible delegated legislation, or those where parliament participates in delegated legislation? Mōri suggests that it is possible to adopt a system having a lower level of intervention, wherein the government cannot enact a delegated order if both Houses refuse a cabinet order proposal.<sup>25</sup> Given Japan's bicameral system, this suggestion takes into account the fact that the institutionalization of parliamentary approval becomes difficult when the House of Councillors has veto power. Britain faced a similar problem during its approval procedure because it does not have a coordination mechanism for resolving bicameral disagreement. The introduction of a system that makes the enactment of a cabinet order invalid ex post is only appropriate for control over delegated legislation in the Diet of Japan; there should not be an approval or disapproval procedure, wherein either or both Houses have veto power and both refuse to approve. A system that invalidates a

23 *Ibid.*, pp. 767-769.

24 T. Suzuki, *Kokkai Un'ei no Riron (The Theory of Business in the Diet)*, Tokyo, Shinzansha, 2014, p. 80.

25 T. Mōri, 'Doitsu Ni Okeru Ininmeirei e no Gikai Ni Yoru Tōsei (Parliamentary Control over Delegated Orders in Germany)', in M. Sogabe & K. Akasaka (Eds.), *Kenpō Kaikaku no Rinen to Tenkai (Philosophy and Development for the Constitutional Reform) I*, Tokyo, Shinzansha, 2012, pp. 456-458.



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**Table 4** *Matters requiring the Diet's approval during a country's state of emergency*

Matters requiring the Diet's approval, based on a specific law	Time	The provision used as a basis	case
Proclamation of a state of disaster emergency /cabinet order to determine emergency measures	within 20 days/immediate summoning of the Diet	Art. 106, 109 and 109-2 of the Basic Act on Disaster Control Measures	no
United Nations peacekeeping operations, internationally coordinated operations for peace and security (so-called primary operations and safety-ensuring operations of peacekeeping activities)	prior consent required in principle	Art. 6-7 of the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations	no
When a state of national emergency has been proclaimed in the event of a large-scale disaster or disturbance, and other national emergencies	within 20 days	Art. 74 of the Police Law	no
Logistics support and other activities in situations that can have an important influence on Japan's peace and security	prior to taking measures in principle	Art. 5 of the Act Concerning Measures to Ensure Peace and Security of Japan in Situations that can Have an Important Influence on Japan's Peace and Security	no
Basic response plan/Response plan for emergency response situation	immediately after the Cabinet decision/within 20 days	Art. 9 and 22 of the Law for Ensuring Peace and Independence of Japan and Security of the State and the People in armed attack situations, etc., and Survived-Threatening Situation	no
Cabinet order to determine the measure for accepting the assistance from overseas, cabinet order to determine the measure for granting of grace period for payment of monetary debt	immediate summoning of the Diet	Article 93 and 130 of the Act concerning the Measures for Protection of the People in Armed Attack Situations, etc.	no
Cooperation and Support activities to armed forces of foreign countries in situations that the international community is collectively addressing for international peace and security	prior consent required with no exemption	Art. 6 of the Law Concerning Cooperation and Support Activities to Armed Forces of Foreign Countries, etc. in Situations where the International Community is Collectively Addressing for International Peace and Security	no
When the government took countermeasures to maintain peace and security in Japan	within 20 days	Art. 10-2 of the Foreign Exchange and Foreign Trade Act	some cases
Implementation of the prohibition on an entry into port of a specified ship	within 20 days	Art. 5-1 of the Act on Special Measures concerning Prohibition of Entry of Specified Ships into Ports	some cases
Defence operations/Public security operation	prior consent required in principle/within 20 days	Art. 76 and 78 of the Self-Defense Forces Act	no

delegated order by decision of only one House may also be considered questionable because the exercise of legislative power requires both Houses to agree.<sup>26</sup>

Therefore, we propose the introduction of a parliamentary control system that invalidates the ex post enactment of a cabinet order if both Houses of parliament refuse the order within 40 days of its submission (Fig. 2). The implementation and organization of the Diet's supervision and control over delegated legislation are indispensable in making these procedures effective. The Committee on Audits and Oversight of Administration has been established in the House of Representatives, and the Committee on Oversight of Administration has been established in the House of Councillors. Both committees have jurisdiction over the monitoring and inspecting the administration. In these committees, the surveillance or check of delegated legislation is not specified in terms of concrete jurisdiction. However, as part of the Diet's surveillance of governmental cabinet order constitutive powers, it is possible to add a check on whether the contents of

26 M. Kawasaki, 'Yuiitsu no Rippō Kikan' no Hōtekina Imi Shatei – Imi Suru Koto to Shinai Koto no Saikō (The Diet as the Sole Law-making Organ of the State: Rethinking the Significance of Article 41 of the Japanese Constitution)', *Hōgaku Kenkyū*, Vol. 87, No. 2, 2014, p. 331.

delegated legislation exceed the authorized limits of the enabling act at the time of the enactment of the delegated order. Of course, during the policy-related checks of delegated legislation, a special screening is needed, and a standing committee comprising representatives of the specific ministries and agencies involved needs to supervise the delegated legislation. A follow-up by the committee, to examine the delegated order's contents and execution process, particularly in relation to issues connected to the attached resolution at the time when the enabling act was enacted, is indispensable. For a standing committee to be implemented, a support organization must be established as per the deliberation of bills by utilizing a professional adviser and researchers from the standing committee and a Legislative Bureau. In our proposal, if both Houses refuse a cabinet order within 40 days, the cabinet order becomes invalid *ex post*. Since it is thought that it is not rejected as long as the ruling party has a majority of the House of Representatives, it will be possible for the Diet to adopt such a low intervention system. The parliamentary control must be exempt from covering the specialized administrative tasks and allow the mobility of tasks to be carried out by the administration in a complex modern nation. Therefore, the mechanism of such a check to the delegated legislation by a Diet will give the opportunity of the cautionary notice and re-examination to the government.

**Figure 2** Introduction of the Diet's control over delegated legislation in Japan

